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No. 11,841

IN THE

United States Court of Appeals

For the Ninth Circuit

ED DEBON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S PETITION FOR A REHEARING AND FOR STAY OF MANDATE IF IT BE DENIED.

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Table of Authorities Cited

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To the Honorable William Denman, Chief Judge, and to the Honorable Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

Ed DeBon, appellant, moves for a rehearing of his cause of appeal upon the following grounds and for the following reasons:

I.

In deciding to affirm the judgment of conviction of the Court below on the conspiracy count and one substantive count this Court necessarily but erroneously must have concluded the appellant had a hand in preparing or causing the veteran Csaki and his partner

Hildebrand to make and file with the WAA the "Veteran's Application for Surplus Property" (see Exh. 13 in appendix to appellee's brief) dated December 11, 1945, or the "Supplemental Veteran's Application for Surplus Property" (see Exh. 14 in appendix to appellee's brief) dated March 27, 1946. The record is conclusive that the appellant did not know either Csaki or Hildebrand at those times. He first met Hildebrand four months later on July 8, 1946 (R. 40, 53, 57, 138, 139, 145), and Csaki on July 24, 1946. (R. 127, 128, 142.) In consequence, neither that application nor the supplemental application has any relevancy to the issues involved in this appeal.

II.

The gravamen of the substantive charge is that the mail order requests contained false representations on their face or that they concealed a material fact. The representation or concealment could only have been in the failure of Csaki (or Hildebrand) to disclose on the fact of those two requests that they were purchasing the Chevrolet gunnery truck and the three White van trucks for resale purposes. However, nothing on the face of those request forms required any such disclosure. Further, the appellant had nothing to do with the preparation and filing of those forms and there is not an iota of evidence in the record showing that he had any knowledge the two veterans had mailed or filed them or that there was any legal requirement that they be made and filed.

This Court's opinion fails to recognize the fact that the appellant was entitled to rely and did rely upon the representations of Hildebrand that he (Hildebrand) and his partner were licensed veteran dealers. Those representations were true. Hildebrand was in such a veteran dealers partnership with Mr. Mee of Bakersfield. Hildebrand, however, did not disclose the name of his partner to the appellant except on the date of sale of the items to the appellant when it was disclosed that his partner's name was Csaki. In consequence, insofar as the appellant was concerned, Hildebrand and his partner were authorized to resell the items they purchased from the WAA and there was nothing to lead the appellant to believe otherwise. So far as the appellant could have ascertained Hildebrand and his partner Csaki were authorized as licensed veteran dealers to resell the Chevrolet gunnery truck and the three White van trucks to him. Inasmuch as Csaki was authorized to purchase the items under his own priorities he obtained good title thereto. Although, under his agreement with the WAA, he had covenanted not to resell those items, his breach of that agreement did not preclude him from passing good title to those items to the appellant. In consequence, it was impossible for the appellant to have joined with Csaki and Hildebrand in making and filing false applications and mail order requests or to have conspired with them so to do.

III.

The record reveals that the jury itself had reached the conclusion that Hildebrand was a veteran dealer dealing in Csaki's priorities and that the two of them sold the items to the appellant. Because the facts indisputably demonstrated that Hildebrand had held himself out to be a veteran dealer (in partnership with Mee who turned out to be Csaki) the jury was vitally concerned about being instructed on the point of law which would have cleared the minds of the jury on the point. The question of law the jury put to the trial judge for clarification was as follows:

> (R. 202) "The third question is, Can a dealer buy on a veteran's priority and sell to a non-veteran on a commission basis?"

That question was not answered and, in consequence, the jury was not instructed on that question of law. That question was vital to the case because Hildebrand had represented to the appellant that he (Hildebrand) was a partner in a licensed veteran dealership and, consequently, was authorized to resell the items. Therefore, the appellant was entitled to an instruction that under such circumstances the appellant was justified in relying on the representation and in buying the items. See *Bollenbach v. U. S.,* 326 U.S. 607, 612-614, and *M. Kraus & Bros. v. U. S.,* 327 U.S. 614, 617.

CONCLUSION.

Wherefore the appellant requests that his petition for rehearing of his appeal be granted and that, in the event it be denied, that the mandate of this Court be stayed pending the filing and docketing in the United States Supreme Court of his petition for a writ of certiorari directed to this Court in this cause and pending final decision thereon of said Court.

Dated, San Francisco, California,
May 18, 1949.

Respectfully submitted,
CHAUNCEY TRAMUTOLO,
Attorney for Appellant and Petitioner.

CERTIFICATE OF COUNSEL

The within petition for a rehearing is well founded in point of law and fact and is not interposed for delay.

Dated, San Francisco, California,
May 18, 1949.

CHAUNCEY TRAMUTOLO,
Attorney for Appellant
and Petitioner.